IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 136.

MARIA DE LAS NIEVES CABRERA Y PRUNA AND MARIA DE LA CRUZ CABRERA Y PRUNA, APPELLANTS,

vs.

AMERICAN COLONIAL BANK, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

As the facts in this case are undisputed, and, as counsel for appellants have doubtless stated them fully in their brief, a very concise restatement of them here will be all that is necessary.

In making references to the record herein the pages of the printed record will be specified.

The appellee filed its bill of complaint on the equity side of the court below to foreclose a mortgage which had been executed in its favor by Maria de las Nieves Cabrera, one of the appellants. The mortgage was in the ordinary form used in Porto Rico, and was of the usual content, except that, instead of being given to secure a direct and personal indebtedness of the grantor alone, it was given as collateral security for

the payment of a promissory note in favor of the appellee for money borrowed by a commercial firm doing business under the name of Sucesores de J. M. Suarez & Co., in which firm said appellant was a silent partner. The note itself was also signed by both said firm and said appellant as principals (Record, pages 30, 31).

The property given as security in this mortgage consisted, first, of a house and lot in the city of San Juan, Porto Rico, which was specifically described therein, and, second, of the interest of said grantor in the property left by her deceased mother, of which the description contained in said mortgage was as follows (translated):

> "The party of the first part, Mrs. Maria de las Nieves Cabrera y Pruna, states that she is one of the heirs of her legitimate mother Mrs. Nieves Pruna y Vanrosi, as per clause nine of the will which she executed in this city on the 24th of February, 1898, before the notary Mr. Mauricio Guerra Mondragon y Mejias, as well as legatee of the third part of free disposition, and with the right of being bettered in the other third part of the properties of the testatrix, both together with her sisters, Mrs. Josefa, Mrs. Magdalena, and Mrs. Ana Cabrera y Pruna, as per clause fifth of the will above referred to.
>
> "And Mrs. Maria de las Nieves Cabrera y Pruna grants: that all and every real and personal right which may belong to her as heir, as legatee, and as favored or bettered heir in the estate and properties of her deceased mother, Mrs. Nieves Pruna y Vanrosi, she cedes, renounces and transfers, without reservation, in favor of the American Colonial Bank of Porto Rico, placing same in her place, person, action and rights," etc. (page 32, 3d paragraph).

The bill of complaint was in the usual form of a bill of foreclosure in equity, with a copy of the mortgage attached as an exhibit. The answer of appellant Maria de las Nieves Cabrera set up that her signature to this mortgage had been obtained by fraud; that the firm of Sucesores de J. M. Suarez

& Co. had paid the debt secured thereby; that the original note signed by her had been renewed without her knowledge or consent, and that appellee had accepted a bill of sale of the stock of merchandise belonging to said firm of Sucesores de J. M. Suarez & Co. in full payment of said indebtedness and had executed a public document acknowledging the same (pages 6, 7). She also denied that the transfer of her inheritance made by her to her sister and co-appellant was with knowledge of the rights of appellee; but, as the assignments of error do not question the conclusions of the court against the appellants on that point, it is not material here.

The answer of the co-appellant, Maria de la Cruz Cabrera, is limited to this latter question of the transfer to her of said inheritance of her sister, and for the same reason it is not material to refer to it further. In fact, it is apparent that the real appellant is the first named, and that her sister merely joins to conform to the rule (pages 7, 8).

These answers, as they appear in the record, contain only what remained therein after exceptions to various paragraphs thereof as originally filed had been sustained and such paragraphs had thereby been stricken therefrom—a fact which explains the long period of time shown by the record to have elapsed between the filing of the answers and of the replication of the complainant thereto. Such replication was finally duly filed, and the cause was tried upon the issues as made by the answers as above stated.

During the progress of the cause the testamentary proceedings upon the estate of the said Mrs. Nieves Pruna y Vanrosi, mother of appellants, was ended and certain specific interests in specific properties set apart to appellant Maria de las Nieves Cabrera as her share of said estate (page 35, Statement 6), and those are the same interests subjected by the decree to the mortgage lien (page 25, paragraphs 2, 3, 4, and 5).

The court below, after hearing the evidence, rendered an exhaustive opinion (pages 13-23), finding the equities to be

with the appellee and authorizing a final decree in its favor, which was thereupon entered (pages 23-25). Thereafter, at the request of appellants for the purpose of appeal, the court made, or rather signed, a "Statement of the Facts" as found by it, intended to be a compliance with the act of April 7, 1874 (18 Stat. at Large, 27), including also certain rulings upon the admission of evidence (pages 29-41), and thereafter perfected their appeal to this court.

ARGUMENT.

To reverse the final decree entered in the manner and to the effect above described, the appellants have assigned four errors on the part of the court below (page 26), which we now proceed to consider and discuss in their order:

I.

> "The action of the court in entering the decree herein notwithstanding the release or receipt executed by complainant in favor of the Sucesores de J. M. Suarez y Ca. on the 13th day of March, 1901, the said Sucesores de J. M. Suarez y Ca. being the principal debtor for whom defendant Maria de las Nieves Cabrera y Pruna was a surety."

In the first place, it is to be noticed that this assignment of error is based in one particular upon a misapprehension of facts. The trial court found that defendant, Maria de las Nieves Cabrera, was a partner in the firm mentioned (page 29, par. 2), and she signed the note as a principal (page 31, top). When a bank loans money and takes security, either by additional signatures to the note or by mortgage on real property, it is understood that the bank looks equally to the principal and the surety or security for payment of the loan. While, as between themselves, one may be primarily and the other secondarily liable, they are both equally liable to the

bank; that is the object for which the bank has required the security. As was said by this court:

> "There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise."
>
> *Joyce vs. Auten*, 179 U. S., 591.

and the unconditional promise contained in the collateral note and the mortgage was that if the firm of Sucesores de J. M. Suarez & Co. *did not pay* at maturity this security should be liable for the debt.

This is practically admitted by counsel for appellants, who by their assignment of error depend upon the contention that the "release or receipt" executed by appellee on the 13th day of March, 1901, conclusivly shows payment of the debt. The court decreed to the contrary, and after so many decisions upon the subject it is needless to do more than refer to the settled doctrine that in investigating that question this court can go no further than to inquire whether the facts found support the decree.

Salina Stock Co. vs. Salina Irr. Co., 163 U. S., 109.

Appellants are evidently depending upon the terms of the instrument in question, which recites a sale of a stock of goods to the bank in consideration of the payment of the note referred to; but the court will notice that even in the instrument itself, in its third paragraph (page 33), it is stated that the bank left the stock of goods in the possession of the debtor firm in order that it might be sold by them.

But what are the findings of the court as to this transaction? Paragraph 8 of the statement contains a recital of this instrument *verbatim;* but that is the finding of an evidentiary, not an ultimate, fact, while the latter part of

paragraph 11 and paragraph 12 (page 38) contain a finding of ultimate fact that neither the stock of goods referred to in said bill of sale, nor the proceeds thereof, were ever appropriated to the benefit of appellee bank, but *were* appropriated to the benefit of said firm of Suarez & Co. or its creditors in bankruptcy, and that at the time of the final hearing and decree there remained due on the note described in and secured by the mortgage of appellant Maria de las Nieves Cabrera the sum there stated, which was the sum for the payment of which the decree was entered. In addition to this, paragraph 9 (page 37) contains a finding of ultimate fact that—

> "There was no agreement or understanding of any character whatever between the parties that the making of this instrument should be considered as full payment of the main loan or debt; that he (the representative of appellee) never saw their stock of goods, or any part of it, or went to their store; that they (Suarez & Co.) remained in possession of it; that he took it (the bill of sale) merely at their request to protect them and keep them going, and that he surely would not have signed the document to release a note and take a stock of goods as a substitute for a real-estate mortgage which he already had and on the strength of which the bank made the loan."

These findings support the decree, and the only question that can possibly remain open—if, indeed, that question be open—is whether said findings are contradicted by the evidentiary finding in paragraph 8, and, if so, which should prevail.

It would appear from the language of various decisions of this court that, in appeals from territorial courts, findings which are of evidentiary, rather than ultimate, facts will not be considered as proper findings; but we do not care to rest our contention upon a technicality. We contend that the court below had the right to go behind the face of the instrument in question and investigate its real consideration and legal effect.

We believe it to be well settled that any court with equity jurisdiction not only possesses the right, but must perform the duty, in a proper case, in order to ascertain the real transaction, to go behind the recitals of an instrument of conveyance and construe it according to its true consideration and significance.

This has never been more clearly or concisely stated than in a well-known decision of this court:

> "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that the deed was made to defraud creditors, or to give preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." (Citing precedents.)
>
> *Peugh vs. Davis*, 96 U. S., 332.

To the same effect are a long line of decisions, including—

Hughes vs. Edwards, 9 Wheat., 489.
Morris vs. Nixon, 1 How., 118.
Russell vs. Southard, 12 How., 139, 147.
Babcock vs. Wyman, 19 How., 289, 299.
Risher vs. Smith, 131 U. S., CLVI App.

The case of *Babcock vs. Wyman, supra,* besides containing a full consideration of the subject, cites several cases in which bills of sale of personal property were the instruments involved.

Naturally, nearly all the adjudged cases are the converse of the one at bar—that is, the grantor in the deed or bill of sale is the party asking relief against its absolute form and asserting it to have been given only as security; but, fortunately, we are not without one adjudication of this court where the grantee in a bill of sale was in exactly the same position as the appellee was in the case at bar.

Morgan's Assignees vs. Shinn, 15 Wall., 105.

In that case Morgan and three others, to wit, Comstock, Kelly, and Savage, became joint owners of a vessel. One Shinn had advanced the money to Kelly to buy his share, and had by advice taken as security, instead of a mortgage, a straight bill of sale. The vessel became indebted and subject to liens, which the appellants therein, as assignees of the shares of Morgan and Comstock, had paid. They sued Shinn for contribution, claiming him to be liable as a part owner by virtue of the bill of sale to him from Kelly. Shinn made the defense that his bill of sale conveyed no title to him, as he had taken it simply as security for the money loaned Kelly, who still really remained the owner of his share and the only one liable for contribution—and so this court held.

We therefore submit that the finding of the court below, that the bill of sale of the stock of goods was not a sale at all, but a mere security taken at the instance of the debtors; that, never being followed by possession or payment of any consideration, it conveyed no title and did not act as a satisfaction of the existing indebtedness or affect it in any way, is in entire accord with the Shinn case, above cited, and in fact with the whole line of cases involving the same applicable principle.

But it may be contended that the District Court of the United States for Porto Rico has no right or jurisdiction to grant relief upon equitable principles. In fact, such contention has been lately made by some members of the bar in Porto Rico, based largely upon the decision of this court in the case of *Romeu vs. Todd*, 206 U. S., 358. But we do not so interpret that decision.

The extent of the decision in the Romeu case, as we understand it, was that a general equitable principle could not be applied in Porto Rico, considering certain language of the Foraker act, so-called, in derogation of a specific provision of the local law which constituted a rule of real property—not because the court was lacking in equitable jurisdiction, but because in the exercise of that jurisdiction a settled rule of real property must be recognized and enforced. The court did not say, and we believe had no intention of intimating, that the principle announced would have any application where the recording laws affecting real property were not involved.

In the case at bar, on the other hand, no real property or recording law is involved: the sole question is the right of the court of equity to investigate the consideration for and the legal effect of a notarial instrument involving personal property only. When the Congress of the United States created the court which rendered the decree below now under review its grant of power and jurisdiction was made in the following language:

> "The district court for said district * * * shall have, in addition to the *ordinary jurisdiction* of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein *in the same manner as a circuit court*."
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> Act of April 12, 1900, Sec. 34.

It seems to us, therefore, that the court below was endowed with all the "ordinary jurisdiction" of both circuit and dis-

trict courts of the United States, and had the right and power to proceed in the consideration and decision of any case within that jurisdiction on the same principles, whether equitable or otherwise depending on the nature of the case, as would those courts of the United States.

But, for the present purpose, it is not even necessary to insist upon that proposition, because the question raised by the present assignment of error is simply a question of the *kind of evidence* the court was entitled to receive and consider in determining the construction and effect of the instrument in question. If the law of evidence of Porto Rico would require the insular courts, which have no equity jurisdiction, to receive the same evidence and reach the same result, then there is an end of the controversy. And that is exactly what would be required, as has been directly determined by the Supreme Court of Porto Rico.

In a case decided by that court on the 28th day of June, 1906, the facts were stated by the court to be that one Texidor and his wife, the owners of certain real estate, had given to a pawnbroker named Robert a mortgage thereon for a loan, which on its face stipulated for interest at a legal rate, but in fact a much smaller sum had been delivered to the mortgagors. Afterwards the real estate was purchased by one Horton, who then brought suit to have the mortgage canceled on the ground that it was void for usury, the local statute being thus severe in that respect, and said purchaser set up the actual transaction showing usury. The pawnbroker defended on two grounds: one, that his license as a pawnbroker protected him; the other—that in which we are interested—that as the mortgage recited a legal rate of interest the court could not go behind that recital to investigate the true transaction. Both these contentions were treated by the court with scant consideration, and in determining the second it used the following language:

> "Parece que el demandado cree, y toda su alegación está basada en esta creencia, que para que una

hipoteca sea declarada usuraria, la usura deberá aparecer del documento mismo. Tal aserción convertaría la ley sobre usura en letra-muerta, y está directamente en conflicto con la sección 25 de la Ley de Evidencia de Puerto Rico. El apelado tambien presume que el objeto de un contrato escrito no puede constituir materia de averiguación por parte de un Tribunal, al examinar su validez, sino que el Tribunal debe presumir que haya sido manifestado correctamente en el mismo contrato. Esta presunción del apelado es contraria al inciso 2do de la sección 101 de la Ley de Evidencia de Puerto Rico y á la jurisprudencia establecida por las Cortes Americanas. No importa que motivo ó causa es expresado en un contrato escrito, la verdad de sus cláusulas no se presume de una manera conclusiva, sino que pueden ser siempre materia de averiguación ante una corte, y puede por tanto proponerse y recibirse prueba para demostrar cual fué el verdadero motivo ó causa de la obligación que se establezca. Véase tambien el parrafo 38 de la sección 102 de la Ley de Evidencia de P. R."

Horton et al. vs. Robert, 3 Castro's Decisiones de Puerto Rico, 410, 415.

A substantially correct translation of the above extract is as follows:

"It seems that the defendant believes, and his whole contention is based on this belief, that for a mortgage to be declared usurious the usury must appear from the document itself. Such an affirmation would convert the law of usury into a dead letter, and is directly in conflict with section 25 of the Law of Evidence of Porto Rico. The appellee also presumes that the object of a written contract cannot constitute the subject of investigation by a court, upon examining into its validity, but that the court must presume that it has been stated correctly in the contract itself. This presumption of the appellee is contrary to the 2nd subdivision of section 101 of the Law of Evidence of Porto Rico and to the law established by the American courts. No matter what motive or consideration is expressed in a written contract, the truth of its pro-

visions is not conclusively presumed, but the same can always be the subject of investigation before a court, and therefore proof can always be proposed and received in order to demonstrate what was the true motive or consideration of the obligation which may be established. (See also paragraph 38 of section 102 of the Law of Evidence of Porto Rico.")

The portions of the Law of Evidence referred to in the above extract read as follows:

"SECTION 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section twenty-eight, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties.

"SECTION 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

"SECTION 101. The following presumptions, and no others, are deemed conclusive: * * *

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration. * * *

"SECTION 102. All other presumptions are satisfactory, if uncontradicted. They are denominated

disputable presumptions and may be controverted by other evidence. The following are of that kind: * * *

"38. That there was a good and sufficient consideration for a written contract. * * *

"SECTION 107. No evidence shall be considered as conclusive or unanswerable, unless so declared by this act."

Laws of Porto Rico, 1905, pages 73, 74, 87, 88, 90.

In the same connection should be considered Article 1186 of the Civil Code of Porto Rico, which reads as follows:

"Public instruments are evidence even against a third person of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein."

Revised Statutes and Codes of Porto Rico, 1902.

"Shall be evidence," the court will notice—*not* conclusive or *unanswerable* evidence.

In view, therefore, of the settled American law, and of the demonstrated consonance of the Porto Rican law therewith, we feel confident the court will find no ground for reversal in the first assignment of error.

II.

"The action of the court in admitting parol testimony of the witness Edwin L. Arnold, cashier of the complainant bank, to nullify and make ineffective the said release and receipt."

The basis of this assignment can only be found in the statement of rulings on the admission of evidence, certified by the court (pages 38-41); and the form of the assignment

indicates that counsel intend hereby to raise substantially the same contention as that discussed under the previous assignment, to wit, that *oral* evidence of the character of that given by Mr. Arnold, as shown in said statement, as distinguished from written evidence, "to nullify and make ineffective the said release."

The fallacy of this contention and the misapprehension of the effect of such evidence seem settled by the cases cited in the preceding discussion, both from this court and from the Supreme Court of Porto Rico. The unequivocal answer is contained in a portion of the quotation already made from *Peugh vs. Davis, supra:*

> "As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, *written or oral*, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. *The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument.*"

If counsel should hereafter argue that the objection made to some particular question contained in the statement certified was technically good and the form of such question objectionable, and that it was the purpose of this assignment to bring such objection to the attention of the court, our reply is two-fold: First, that such contention is not properly raised by the form of the assignment; and, second, that the admission of some item of improper evidence is not sufficient ground for reversing a decree, where it appears that such evidence did not materially affect the result.

United States vs. The Burdett, 9 Pet., 682, 689.
Gilbert vs. Moline Plow Co., 119 U. S., 494.
Ivinson vs. Hutton, 119 U. S., 604.
Ruckman vs. Cory, 129 U. S., 387.
Greyson vs. Lynch, 163 U. S., 468, 481.

In the first of the above cases the court said:

> "But it is not material to decide the point raised on the rejection of the letters. They may be considered as a part of the record, and as presenting all the facts which they contain, in connection with the other facts of the case, for the consideration of the court. And if on this broad view of the merits, the prosecution shall not be sustained, it will become wholly unnecessary to determine any question as to the admissibility of evidence."

And in the last cited case occurs the following terse expression:

> "While it is possible that some questions may have been asked of these witnesses which were irrelevant, immaterial, and incompetent, the reception of such evidence, as already observed, does not vitiate the findings of the court, or entitle the party to a new trial."

In the record now before the court the only finding having any relation to the evidence given by Mr. Arnold in answer to these questions objected to is that in the 9th paragraph (page 37), where the court finds various facts from the testimony of Mr. Arnold. Omitting from that paragraph everything in any way referring to the answers in controversy, it would read as follows:

> "(9) From the testimony of Mr. Arnold, the cashier, the court finds that when this instrument was prepared, March 13, 1901, he went to the notary's office and signed it without having much of an idea of what it contained, and when on the stand, during the trial of the case, he seemed to be somewhat surprised at its exact phraseology when some of it was read to him; that when he signed it he had no idea of giving up the mortgage security which the bank held as security for this debt and on the strength of which the loan was made; that there was no agreement or understanding of any character whatsoever between the parties that the making of this instru-

ment should be considered as full payment of the main loan or debt; that he never saw their stock of goods, or any part of it, or went to their store; that they remained in possession of it; that he took it (the bill of sale) merely at their request to protect them and keep them going, and that he surely would not have signed the document to release a note and take a stock of goods as a substitute for a real-estate mortgage which he already had and on the strength of which the bank only made the loan."

And these facts, we submit, would be, in connection with those found in the other paragraphs, amply sufficient to support the decree.

If the objections shown in said statement of rulings should be held open to consideration, framed as the assignment is, we nevertheless submit that such rulings could not have materially affected the result; hence the decree should not for that cause be reversed.

III.

"The decree of the court rendered herein is contrary to the evidence and to the equities of the case."

As the evidence is not contained in the record, and this court would not review it if it was, and as the main contention upon which appellants hope to obtain a reversal of the decree is based upon the want of jurisdiction in the court below to administer equitable remedies or principles, there seems to be nothing to argue under this assignment, especially as the question of the equities between the parties has already been discussed under the first assignment of error.

IV.

"The action of the court in entering a decree in favor of complainant, subject to the mortgage of February 21, 1900, to properties which were subsequently awarded to defendant, Maria de las Nieves Cabrera y Pruna, out of and from the inheritance in the estate

of her deceased mother, which partition and assignment did not take place until after the said mortgage."

The exact meaning of this assignment is not clear, the second clause probably being intended to read "subjecting to the mortgage of February 21, 1900, the properties," etc. However, it seems intended to question the power of the court below to subject to the lien of appellee's mortgage the property inherited by the appellant mentioned from her mother, *because* the partition of the inheritance between the heirs and the assignment of specific portions of the property inherited to said appellant did not take place until after the mortgage was given to appellee.

In the first place, it is to be noted that a distinct allegation of the right of appellee under said mortgage in said appellant's portion of the inheritance from her mother was contained in its bill of complaint (page 2) and no denial of that allegation is contained in her answer (pages 6, 7). Hence no issue was raised regarding it. But, even were it in issue, the court below was right.

The mortgage recites, and the court finds, that her mother was deceased at the time of its execution (page 33), and the court further finds that subsequent thereto and before the decree the testamentary proceedings relative thereto were terminated, and the portion of the inheritance thereby assigned to said appellant was an undivided interest in certain parcels of real estate, which are the same described in the decree (page 35, par. 6; page 24, pars. 2, 3, 4, and 5). As the mother died previous to the date of the mortgage (February 21, 1900), the inheritance was transmitted in accordance with the provisions of the Civil Code there in force previous to the present Civil Code of 1902. This is usually called the Old Civil Code and may be found in English in a War Department translation made in 1899.

By said law then in force the *title* to an inheritance passes

at once and *vests* in the heir or devisee from the moment of death.

> "Art. 657. The rights to the succession of a person are transmitted from the moment of his death.
>
> "Art. 658. Succession is granted either by the will of the man as expressed in a will or, in its absence, by provision of law.
>
> "Art. 659. The inheritance includes all the property, rights, and obligations of a person, which are not extinguished by his death.
>
> "Art. 660. An heir is a person succeeding under an universal title; and a legatee, one succeeding under a special title.
>
> "Art. 661. Heirs succeed the deceased in all his rights and obligations by the mere fact of his death."
>
> Title III, "Successions," Civil Code of 1889.

Following the above sections or articles is chapter first, which treats of "Wills," and chapter second, which treats of "Inheritances," and in this chapter is included—

> "Art. 789. All that is prescribed in this chapter with regard to heirs shall also be applicable to legatees;"

showing that the rights are the same whether the inheritance is by will or operation of law.

The right of heirs or devisees to alienate their inheritance before the "divisoria," as it is called, or division, is made is also recognized by the same Code:

> "Art. 1067. If any of the heirs should sell his hereditary rights to a stranger before the division, all or any of the coheirs may subrogate himself in place of the purchaser, reimbursing him for the value of the purchase, provided they do so within the period of a month to be counted from the time they were informed thereof."

Nor does the Code make any distinction between selling and mortgaging:

"Art. 1874. The following property only can be the subject of a mortgage contract:

"1. Real property.

"2. Property rights in real estate which can be alienated in accordance with law."

All the foregoing are copied from the War Department translation. The English used is not always grammatical nor otherwise to be commended, but the meaning, in these paragraphs at least, is plain. The provisions of the last quoted article (1874) are repeated in the Mortgage Law, article 106.

The Supreme Court of Spain has also construed the law in the respect referred to, holding that an heir or devisee not only has a right to sell or mortgage his interest in the inheritance before the division, but also that such lien or alienation follows the portion of the inheritance subsequently set apart to him.

Jurisprudencia Civil, vol. 66, page 684.
vol. 96, page 853.
vol. 101, page 15.

We therefore think the court will find the fourth assignment of error as unfounded as the three preceding.

V.

Since concluding the foregoing argument, based upon the record and assignment of errors as printed, we have been generously favored by opposing counsel with a copy of his printed brief, and in reply thereto we beg to submit the following comments and considerations:

(1) In counsel's discussion of his first point he argues that, as appellant M[illegible]a de las Nieves had paid in full her contribution to the [illegible] of Sucesores de J. M. Suarez & Co., she could not be held "responsible for its debts to any additional or greater amount." That might be true as to any further responsibility by *virtue of the partnership articles,*

but cannot affect her liability upon a *separate obligation*, voluntarily contracted, for a valuable consideration.

(B) In order to avoid the effect of finding numbered (9), made by the court below, counsel describes it as a "recital of the testimony" of a certain witness. Upon inspection (Record, page 37) the court will see that said finding does more than counsel indicates, and *from* the testimony of the witness *finds* certain facts, as it well might do, as that witness was uncontradicted.

But if finding (9) were not of an "ultimate fact," much less would be such the *verbatim* copies of the instruments contained in findings (3), (5), and (8) (pages 30, 31, and 35); and, with those instruments debarred from consideration, there would be no findings upon which this court could consider the merits of the appeal, but the decree below would be affirmed for want of such findings.

Wilson vs. Merchant's Loan & T. Co., 183 U. S., 121.

(C) Counsel's argument on pages 16 to 18 of his brief, as to the error in the admission of the oral evidence of the witness Arnold, is sufficiently answered by the cases cited under Subdivision II above, but we desire especially to call to the court's attention that the construction given by counsel to certain sections of the Law of Evidence of Porto Rico is directly opposed to that given by the Supreme Court of Porto Rico in the case quoted from in the above part of our brief.

More than that, the action of the trial court herein in admitting evidence of the circumstances of the alleged "release" and of the real agreement and intent of the parties in executing it is supported by a long line of authorities from the Supreme Court of Spain itself:

Juris. Civil, vol. 78, page 494.
vol. 79, pages 232-568.
vol. 86, page 408.
vol. 89, page 121.
vol. 93, page 311.
vol. 97, page 441.
vol. 101, page 615.

In the above-cited case from vol. 83 the court, in explaining the significance of article 1218 of the Civil Code of Spain (which is the equivalent of the article 1186 of our Code, above quoted at the end of Subdivision 1), says (on page 486):

> * * * el art. 1218 del Codigo civil no concede valor preferente, ni menos decisivo, á los documentos publicos en concurrencia con otras pruebas de igual ó diferente clase;

of which the translation is:

> "Article 1218 of the Civil Code does not confer a higher value, and still less a decisive one, upon public documents as compared with other evidence of the same or a different class."

From the above citations it is seen that the Spanish law even permits what our own does not—the admission of oral testimony regarding all the terms of a contract upon equal footing with the writing which evidences it.

(D) In the discussion of his point No. 2, on pages 18 to 20 of his brief, opposing counsel fails to distinguish between the *promissory note*, which was the primary obligation and was signed both by Sucesores de J. M. Suarez & Co. and by appellant Maria de las Nieves, and the *mortgage*, which was given and executed by the *latter alone*. This *mortgage* is the cause of action in the present suit, and in it there is but one party bound, and the condition of her obligation is stated to be that she should "pay the eight thousand pesos, provincial money, *y* (and) interest, of the promissory note of which she is surety, because of (at) its maturity it should not have been paid by Successores of J. M. Suarez." The event upon which she had voluntarily conditioned her obligation having occurred, *i. e.*, the non-payment by the firm of Suarez, that obligation became fixed.

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(E) The next contention of counsel on the other side is that the document of March 13, 1901, constituted a novation. We fail to see any earmarks of such a condition. If it constituted a payment in full of the indebtedness, as counsel elsewhere contends, it was not a novation, but an extinguishment. If the debt was paid, the contracts relating to it were ended, and there remained no *obligation* on the part of anybody. If it were not paid, the findings of the court below distinctly negative the idea of a novation. Nor does counsel explain the application to the facts found of the provisions of article 1203 of the Civil Code which he quotes. Turning to article 1156 of the same Code, we find that obligations are extinguished in six distinct ways, of which *payment* is the first and *novation* is the last. According to said article 1203, the principal feature of a novation is the substitution either of person or object, yet the court expressly finds that the appellee did not give up its mortgage security—in fact, never carried into effect the terms of said instrument (finding 9).

(F) Nothing cited by counsel for appellants under his point No. 4 can overcome the citations in the subdivision IV of this brief. The citations from the Civil Code are the same, while those from the Mortgage Law are not applicable. Clause (5) of article 108 refers to things that "will be owned in the future," and counsel in comment refers to "future hereditary rights of the kind described in the document under consideration." That the language of this clause (5) has no application to an inheritance already *in esse*, but simply remaining undivided, is shown by the language of the Commentator Galindo, quoted by counsel himself on page 24 of his brief, where it is said that the Mortgage Law, in consonance with the Civil Law, is opposed, "especially with respect to successions, to the transfer of an *expectation* of those who have the *presumption* of succeeding a determined person." Such reasoning is in no way inconsistent with the law as cited

by us, simply because it applies to a different thing. So far as the discussion refers to "inscription in the registry," it is further impertinent, because such inscription is only material when dealing with the rights of third parties, and no rights of such parties are involved in the present controversy.

(G) The argument of counsel for appellants under his point No. 5 has already been answered under (D) *supra*.

In conclusion, we respectfully submit that no material error was committed by the court below in entering its final decree herein in favor of the appellee, and that said final decree should be affirmed.

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